No. 8996 ~~8896~~

IN THE

Supreme Court

OF THE

State of California.

THE PEOPLE,

Respondents,

vs.

GOLD RUN D. & M. CO.

Appellant.

Brief for Respondents.

A. L. RHODES,
I. S. BELCHER,
Of Counsel for Respondents.

No. 8896.

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THE PEOPLE,
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GOLD RUN D. & M. CO.,
Appellant.

Respondent's Brief.

It appears in the case, from the allegations of the complaint and the finding, that the first observable filling of the bed of the Sacramento River at and below Sacramento City, and of the American River near that city, was during the flood of winter of 1861–2.

During that flood debris was first deposited on the valley lands of the American River; but the material so deposited was very similar in quality to the soil of the valley lands. Since 1862 the debris has been deposited in the Sacramento River every year, and has resulted in the filling of the

river to the depth of from six to twelve feet. The deposit has been of such a depth that it has rendered the river non-navigable by vessels of deep draft—of such draft as were accustomed to navigate the river up to 1862—except during the floods and the times of high water. The debris has every year been deposited in the American River, below Alder Creek, which is about 27 miles above Sacramento City.

The filling up of the beds of the rivers has caused overflows, which have increased annually, and which carry and deposit on the lands adjacent to the Sacramento and American rivers, a large mass of debris. The debris has covered and virtually destroyed ten thousand acres of land on the banks of the Sacramento and American rivers. If the deposit of debris continues, it will cover and destroy one hundred thousand acres of land in addition to that which is already covered. It is found by the Court that the debris which comes from natural erosion is light and fine, and composed, to a considerable extent, of organic matter, and is easily disposed of and carried down the river and deposited upon the lands adjacent to it, and some portion is carried down and deposited in Suisun Bay, the materials, as we have said, being similar to those of which the soil of the valleys is composed.

A large part of the debris from the hydraulic mines is of a different character from that which comes from natural erosion—it is heavy and coarse and is moved down in the channels of the rivers and remains in their beds and fills them up, being

composed mainly of sand, gravel, cobbles and boulders; and those materials would, by the operation of natural laws, seek the lowest places, and would necessarily fill the beds of the river first; and then, as the beds became shallow, would spread over the adjacent lands. Of the debris which is transported by the American River, more than one-half proceeds from the mines. The hydraulic mines which are worked upon the watershed of the American River contribute by far the larger part of the mining debris. The debris from those mines is dumped directly into one of the forks or branches of the American River, or the streams or ravines that unite with it, and is being transported by the waters to the lower section of the river, and into the Sacramento River and over the lands adjacent to both streams.

There has been extracted from the Gold Run mine 67,000,000 cubic yards of earth, composed mostly of sand, gravel, cobbles and boulders. There still remains in the mine 20,000,000 cubic yards of similar materials, which are said to be heavier than those which have already been extracted. This amount the defendant intends to extract from the mine. All the debris from this mine is dumped into Cañon Creek, and from thence flows into the north fork of the American River, and thence flows down the American River, and from thence a large portion is conveyed into the Sacramento River. The Gold Run mine is the largest hydraulic mine on the American River.

It is unnecessary to state in detail all the facts alleged in the complaint, or found by the Court;

but we refer to the finding in this case as containing a full and fair statement of all the facts. No question is made in this case as to the sufficiency of the evidence to sustain the findings, at least none is presented by the defendant in its brief, and we shall therefore assume that no objection of that kind is made in this case. We shall confine ourselves mainly to the consideration of the points made by the defendant.

The foregoing facts show that a public nuisance has been created by the manner in which the debris has been dumped and caused to be transported by the waters of the rivers, into the navigable waters of the Sacramento, and over large bodies of land adjacent to them; and they also show that if the hydraulic mines are operated as the defendant and the owners of the other mines intend to do, the public nuisance will continue, and still greater injury will be inflicted upon the public, culminating in the destruction of the navigation of the Sacramento River and the overwhelming of thousands of acres of lands that are not yet reached by the debris.

I.

Motion to Strike Out Portions of the Complaint.

There are many specifications in the motion, but the argument of the defendant is confined mainly to that portion which avers injury to the lands of private parties. The objection urged is, that the injury to, and the destruction of, a large number of tracts of land owned by many persons, will not constitute a public nuisance.

We answer first: this litigation was conducted, on both sides, in the Superior Court, on the understanding, often announced by the Court and counsel, that the real purpose of this litigation was the determination of the question whether hydraulic mining could lawfully be conducted on the American River in the manner in which it was being prosecuted—in other words, whether or not the debris from the mine which was cast into the river, and from thence transported down the river into the beds of the streams and spread over the adjacent lands, constituted a public nuisance for which the defendants are legally liable.

Second. The injury to 10,000 acres of land, and the threatened injury to 100,000 acres in addition, all owned by individuals, clearly comes within the definition of a public nuisance, as given in the Civil Code, in sections 3479 and 3480. It does manifestly interfere with the comfortable enjoyment of property, and the injury affects a considerable number of persons. The case fully fills the definition given by the Code. The reports of the Courts, both in the United States and in England, exhibit a large number of cases in which the question of the greatest difficulty was, whether the matter complained of in the case, constituted a public or only a private nuisance. In order to avoid and obviate this difficulty, the Code adopted the definition mentioned in those two sections, and thereby established as the law of nuisances, that whenever the injury complained of does in fact affect a large number of persons, it constitutes a public nuisance, even though under

the law as it existed prior to the Code it would have been held to be only a private nuisance. The Code has established the test, and by it a nuisance which affects an entire community or neighborhood, or any considerable number of persons, is a public nuisance.

Smoke from a furnace, or fumes from soap works, might injure only 100 out of 100,000 inhabitants of a city, but nevertheless it comes within the definition of a public nuisance as given in the Code. Definitions taken from law dictionaries and text books are of no avail in presence of the Code definition. The definition given by the defendant eliminates a portion of the Code definition; for, if as contended by the defendant, a nuisance be not a public nuisance unless it affects some *public* or common right, then no injury to property can, by any possibility, be a public nuisance unless it also be an injury to *public* property. Such was not the common law, as we understand it; and if it ever was a rule of the common law, it has been changed by the Code.

But if the Court erred in refusing to strike out that portion of the complaint which relates to the injury to the lands of private persons, still that is not material, for it affected no substantial right of the defendant. If a public nuisance was created by the defendant in any one respect, such as an injury to the navigable waters of the state, the judgment of the Court must be the same as it would be if the injury affected also the lands of a considerable number of persons, or of an entire community. The case clearly shows a public

nuisance within the defendant's definition, that is, by the obstruction of the navigation of the Sacramento River; and the injunction will be retained though the Court did not find that a public nuisance was created in another manner; that is to say, by an injury to, or the destruction of, the lands of a considerable number of persons. The scope of the injunction is the same, where the purpose is to preserve the navigation of the river, as it would be, were the object the protection also of lands of a considerable number of persons. The error, if any it be, is immaterial.

II.

The Findings Show that the Defendant Materially Contributed to the Alleged Nuisance.

It is alleged in the complaint, page 7, that the defendant largely contributed to the filling up of the beds of the river, and to the overflow of the adjacent lands with debris; and the materiality of the allegation cannot be doubted. It is not necessary that the findings should expressly state in so many words, that the debris from the defendant's mine materially contributed to the alleged nuisance; but all of the exigencies of the case are met, if the facts found necessarily or conclusively show that the defendant materially contributed to the injury complained of. The findings do show conclusively that the defendant materially contributed to the alleged injuries. The sixth finding, after describing the filling of the beds of the American and Sacramento Rivers, states that such filling has

been materially increased by the debris from the the hydraulic mines, and in the third paragraph of same finding, (folio 155,) it is stated that the debris from the mines, including the mines of the defendant, has materially contributed to the filling of the river channel, and thereby has interfered with and obstructed the free and comfortable use and enjoyment of large portions of the land upon the American and Sacramento Rivers.

It is stated in the tenth finding (folio 162) that by said mining of the defendant and other miners, the filling up, raising and shallowing of such river has been materially increased, to the impairment of the navigation of the Sacramento River and to the excessive overflow of the lands adjacent to said river.

The fact of the continued prosecution of mining by defendant and others is stated in the twenty-first finding (folio 175), and it is found (folio 160) that the defendant will continue to mine its mining land, which contains 20,000,000 cubic yards of earth. These are findings that the defendant does and will materially contribute to the filling of the river and the overflowing of the adjacent lands with the debris from its mine.

But the facts as found also conclusively show that the defendant did and will materially contribute to the filling of the river and the overflow of the adjacent lands with debris. It is found: first, that the bed of the Sacramento River has been filled at the shoals six and one-half feet or more (folio 204); second, that the natural erosion of the soil is not responsible for one-half of the

material that has moved along the bottom of the river (folio 886); third, that debris from the mines is heavier than that coming from natural erosion (folio 188); fourth, that the acts threatened to be performed by the defendant will, in connection with like acts by others, obstruct the navigation of the Sacramento River (folios 167, 175); fifth, that 67,000,000 cubic yards have been extracted from the defendant's mine (folio 191); sixth, that most of this came down the river (folio 195); seventh, that the materials in the defendant's mine yet to be extracted amount to 20,000,000 cubic yards (folio 160); eighth, that the defendant discharges into the river 600,000 cubic yards of earth annually (folio 161); ninth, that a large portion of this will come down the river (folio 197); tenth, that no other mine contributes annually more detritus to the river than the defendant's (folio 199).

We think, therefore, and confidently assert, that the facts stated in the findings conclusively show that the defendant materially contributed to the filling of the river, to the impairment of the navigation, and to the overflow of the lands adjacent to the river.

The paragraph found in folio 169, and part of which is cited in defendant's brief (page 82), does not in the least militate against this conclusion. It is not intended thereby to deny that the debris from the mines produces the injury complained of, nor that the defendant is the largest contributor of debris to the river channel and the adjacent lands. Reading first, the last sentence of the par-

agraph, there is no room left for doubt as to the meaning of the Court, nor do we think, that in reading the sentences in the order in which they stand, there is any doubt as to the meaning intended to be conveyed by the paragraph. The last sentence is: "It is the aggregate of debris from all the mines which produces the injury mentioned in these findings." Then all the mines taken together must contribute to the injuries mentioned. If there are ten mines, each discharging the same amount of debris, then each must of necessity materially contribute to the injuries mentioned. In the preceding portion of the paragraph, after stating that the defendant's mine is as large a contributor of debris as any mine on the American River, the Court says that he is unable to say that the defendant's mine materially contributes to the evils mentioned; and the Court, to prevent the very misinterpretation into which the defendant seems to have fallen, resorts to a paraphrase, and says that he cannot find that the defendant's mining operations would materially injure navigation, etc., if there were no other mining operations on the river.

But the Court does not find that the contribution from the defendant's mine is not, or would not be material, when considered in connection with the contributions of other mines, and natural erosion; but in the contrary it is declared, that the aggregate of the contributions from all the mines does produce the injuries complained of. If only one out of ten, twenty or a hundred mines, cast its debris into the river, the action of the waters might

dispose of it in such a manner that it be practicably unimportant, that it would do no injury; but that was not the case then before the Court. But if all those mines discharge their debris into the stream, it would injure if not destroy the navigation of the Sacramento River; and such was the case then before the Court.

The annual contribution of 600,000 cubic yards of earth to the American River, and which continually flows down that river and into the Sacramento River, is a material contribution; and it being heavier than debris from natural erosion will necessarily lodge in the channel of the Sacramento River, or in times of flood be carried upon the adjacent lands, and will constitute a continuing nuisance.

If the Court found the amount of debris which was being dumped into the cañons and streams, and that it would necessarily flow down the river, fill the channels and go upon the adjacent land; those facts, when taken into consideration with the condition of the river and the adjacent lands, would show whether or not the contribution was material; and it would be unnecessary for the Court also to find expressly, that the 600,000 cubic yards of annual contributions of debris from the defendant's mine was material—that that amount of debris would materially contribute to the continuance of the alleged nuisances.

III.

The Defendant is Liable for its Contributions to the Deposits of Debris, Though Others are Engaged in the Same Business.

The defendant claims that it is liable only for its individual deposits; that its liability cannot be made to depend on the fact that the debris from other mines flows into the streams; and that to hold it liable in such case would virtually make it liable for the acts of others; that it would be holding the defendant liable as a joint tort feasor, when in fact there is no joint act as between the defendant and other mines. We claim that the defendant's individual deposit of debris created a nuisance. In addition, our position is that the aggregate deposit of debris created a nuisance; and that, as the defendant materially contributed thereto, he is liable, even though this individual deposit were ever so small.

And we contend that it is not necessary to show the defendant to be a joint tort feasor in order to render it liable for the results of its acts. The liability of the defendant does not depend in any degree upon its being shown that its acts were done or performed jointly or were concurrently with others. If water flowing into a road from natural causes, injures it so as to obstruct the thoroughfare, a person who adds more water to the water flowing in the road, would be liable for the creation of a nuisance; but it would not be claimed that natural causes and the persons above supposed

to were joint feasors. This subject is so well discussed in—

Thorpe vs. *Bromfit*, 8 L. R. (Eq. Ca.) 654,

that it is unnecessary to consider it further here.

If this be not the rule, then there may be cases of intolerable public nuisance which are beyond the reach of all legal remedy, simply for the reason that a large number of persons, acting independently, and not jointly or in concert, severally performed acts which contributed to the injury, and for which they were not liable jointly, as was held in—

Keyes vs. *Little York*, 53 Cal., 72–4.

In the case supposed by Lord Justice James in deciding *Thorpe* vs. *Bromfit*, the injured party would have no remedy, if the position of the defendant here be law, against any of the hundred persons who severally left the wheel-barrows standing in the way, so as to completely obstruct it; and under the rule in *Keyes* vs. *Little York*, they could not be held jointly liable. We are confident that if the defendant does not, this Court will, shrink from an argument that has this conclusion.

The decision in—

Keyes vs. *Little York*, 53 Cal., 724,

as we understand the case, is applicable here in only one respect, and perhaps inferentially in that. It is there held that in an action to enjoin a nuisance, in which the complaint states that the

defendant severally, and not jointly, nor acting in concert, performed similar acts, which produced the alleged injury, and the defendants having no interest in common in the subject-matter of the suit, a demurrer for misjoinder of the defendants will be sustained.

One inference deducible therefrom is, that a separate action might be maintained *against each defendant* upon the facts alleged in that complaint. It would have been useless to discuss the effect of misjoinder, if the facts stated constituted no cause of action against each of the defendants severally. We dismiss that case with the remark that this case is bronght in strict conformity with the doctrines of that case. It is brought against *only one* of the many parties who are separately depositing the debris from their mines in the waters of the American River, and we do not attempt to hold it liable for the acts of others. We contend that the streams and the adjacent land being now in the condition described and found, the additional amount of debris which the defendant intends to contribute, will continue and aggregate the existing nuisance.

Upon the point under discussion, whether the defendant can be held liable while other persons are separately and severally doing acts similar to those performed by the defendants, we cite also:

Hilman vs. *Newington*, 57 Cal., 56.

Woodyear vs. *Shaffer*, 57 Ind., 1.

Wood on Nuisances, S. S. 107, 401.

In—

Little Schuykil vs. *Richards*, 17 Penn. St., 142,

it is said by the Court: "The complaint seeks to charge the defendant below with the *whole injury* caused by the filling up of the basin," and it was held that the defendant was liable only for the damage occasioned by itself, and not for the damage occasioned by others, who were severally contributing to the injury. That was not an action brought by the State to enjoin a nuisance, but was an action for the *recovery of damages* sustained by reason of the nuisance.

A similar doctrine is laid down in

Chipam vs. *Palmer*, 77 N. Y., 51,

it being there held, that each of the persons discharging sewerage from his lot in the stream was liable for the damage occasioned thereby, but that he was not liable for the damage occasioned by others; but it does not seem to have occurred to the Court in either of the above cases, to hold, or even intimate, that the defendant was not liable for his own acts, or the consequences thereof, for the reason that other persons were performing similar acts, casting debris or sewerage into the same streams.

If the doctrine of—

Attorney-General vs. *Stewart*, 5 C. E. Green, 419,

in which it was held that the discharge into a stream, of blood from slaughtered animals was *per se* a nuisance, then we confidently assert that debris which will necessarily flow into the bed of the Sacramento River, and contribute to the filling of the channel, is a nuisance.

There is no demand here to hold the defendant responsible as a joint tort feasor, nor for the acts of others, but we contend that the fact that the contribution of the defendant is small, as compared with the aggregate of all the contributions of debris to the American River, will not excuse it from liability.

And if the exigencies of this case required it, we are prepared to maintain the position, upon principle and a large number of authorities, that even if the contributions of the defendant be so small, that it would be difficult, if not impossible, to sustain an action or an indictment against it, if it was the sole contributor, it is still liable in this action, as contributing to the maintenance of a public nuisance. The fumes from one manufacturing establishment might be in some degree annoying to the people living in its vicinity, but it might not be intolerable; and the same might be true when a similar establishment was put in operation in the same vicinity; but by the operation of ten establishments, at the same place, the fumes might become intolerable to the neighborhood, might be a public nuisance. Argument to sustain this position is altogether unnecessary, in view of the contribution by the defendant, of 600,000 cubic yards of debris annually to the river.

IV.

Authority Claimed Under the Acts of Congress.

It is claimed by the defendant that authority was given by legislation of Congress, and by legislation on the part of the state, to hydraulic

miners, to work their mines in such a manner that the debris therefrom, must necessarily flow into the bed of the river, and thus materially injure their navigation, and also flow over the adjacent lands and thereby injure and destroy them.

Congress has not competent authority to define a public nuisance—that, is the province of the Legislature of the State. Upon this proposition we refer with confidence to the case of

Pollands, lessee, vs. *Hagan*, 3 How. 223,

in which it is clearly held, that the United States have no constitutional jurisdiction within the limits of a State, except in the cases in which it is expressly granted. It is as much beyond the power of Congress to define a public nuisance, as it would be beyond its power to define a misdemeanor committed in the administration of a municipal government, organized within a State. For the same reason that Congress cannot decide what shall be deemed a public nuisance, as between the State and its citizens—and that reason is, briefly stated, the want of power—Congress cannot declare, either directly or indirectly, that a particular thing shall or shall not constitute a nuisance. Congress, under the power to dispose of the lands of the United States, could not remove earth from the portion of mining land owned by the United States, and pile it upon lands owned by private persons, nor can it be claimed that it has power to authorize that to be done by others, which it could not itself do. It has no more power to authorize such acts to be done, than it has directly to do it itself.

It is not claimed by the defendant that the authority to mine in this manner has been *expressly* conferred by any act of Congress, but it is claimed that it comes from necessary implication, from the acts of Congress. Such rights would never be inferred in any case, from any act or series of acts of Congress, where such rights would be in hostility to important and valuable public rights secured by the legislation of Congress, nor in cases where they would be violative of private rights, which are secured by the constitution of the United States as well as the common law, in its application to the rights of property; but, even if express authority were given by an act of Congress, we contend that it would be unconstitutional and void, so far as the lands of individuals are concerned; for it would be in manifest violation of the Fourteenth Amendment of the Constitution of the United States, which provides that no person shall be deprived of his property except by due process of law. The destruction of the lands of a private person, by covering it with debris to a considerable depth, is for all practical purposes, a taking of the land, and this cannot be done except upon making due compensation therefor. This doctrine is clearly and forcibly stated by Mr. Justice Miller in—

Pumpelly vs. *Green Bay Co.*, 13 Wall. 181,

in which the principle was applied to a case, where the lands of a party were flooded with water, by means of a dam constructed in a river to improve its navigation.

So far as the injury to navigation is concerned, our position is, that the organic act by which the State was admitted into the Union, was virtually a compact between the United States and the State. The Sacramento River, to a point above the junction of the American River, was then navigable and the tides ebbed and flowed therein. By virtue of the organic act the navigation of the river was secured. The act by which the State was admitted into the Union being regarded as a compact, Congress could not destroy one of its principal provisions, that in regard to navigation; and for the same reason the State could not destroy it. Nothing less than the joint action of both governments, at least their concurrent action, could abrogate this, which is one of the most essential provisions of the organic act.

The defendant refers particularly to three acts of Congress as conferring the authority in question —the act of July 26, 1866; the act of July 9, 1870; and the act of May 10, 1872. The leading purpose of those acts is to declare that the mineral lands of the United States shall be open to exploration for mines; that mining claims may be taken up, located and held; that titles may be procured from the United States to such lands; and provision is also made in those acts for the right of way for water ditches. The act first provided, among other things, that the mineral lands should be subject to regulations, prescribed by law, in respect to their exploration and occupation, and should also be subject to the local customs and rules of miners in the several mining districts, so

far as the same might not be in conflict with the laws of the United States.

The Act of July 9, 1870, added certain sections to the Act of 1866, by which the provisions, with some slight modifications, were extended to placer mines, and still further secured accrued rights to water, and the right of way for water ditches, etc. The Act of May 10, 1872, contains no further provision, having any material bearing upon the question here involved.

Under those Acts, persons in the exploration and occupation of the public mineral lands, were subject to such regulations as might be prescribed by law—that is, Acts of Congress—and also to the "local customs and rules of miners, in the several mining districts, so far as the same may not be in conflict with the laws of the United States." As such customs and rules had no force in any mining district, if they conflicted with the laws of the State, no custom or rule received any sanction or recognition by those Acts of Congress, if it was in conflict with any law of the State. The reference, in the Acts of Congress, to such customs and rules, did not make them valid, but the Acts only declared, in effect, that such as were valid, should be applicable to the public mineral land in the district where such customs and rules were in force. This subject will hereafter be considered

In answer to the defendant's argument based upon the provisions of these Acts of Congress, which he insists encouraged and legalized mining, we urge that the United States are merely private proprietors of the public land within the State;

that they have no power over or in respect to those lands, other or greater than an individual possesses over his lands, except that they have power to make rules and regulations respecting their location, sale, etc., which might be different from those which an individual might make, respecting his lands, under the laws of the State, respecting sales and conveyances of interests in land.

In respect to these lands, Congress did not in fact, by means of those Acts, make any regulation or provision respecting the disposition of the lands, than could an individual have done, had he owned them. An individual could have opened them up to exploration, subjected them to valid local customs and rules of miners, granted the right of way for water ditches, and made provision for the conveyance of the lands, on specified terms and conditions.

In accomplishing any purpose, in any one of those respects—in disposing of the lands—the United States have no more power than would a private individual, to impose any burden, or charge, or servitude upon lands not belonging to the United States. They could not grant the right of way from a mine on public land, over the land of an individual, for a road, tunnel, or flume or ditch or for the flow of debris; nor have they the power to authorize the deposit of debris upon any lands except the lands belonging to the United States, nor in any waters which are not navigable waters, for the lands under those waters are the lands of the riparian owners of the lands on the banks of those

streams; and clearly no authority could be given to deposit them in the navigable waters of the State, for that, as we have seen, would result in the destruction of navigation, which was intended to be, and was in fact, secured by the organic act The regulations, local customs and rules mentioned in the act, were intended to be, and were in fact made applicable to the public lands; and were not intended to be and could not by any possibility be made applicable to any other lands than public lands.

It will be noticed also that the language of the act is, "the local customs and rules of miners in the several mining districts,"—clearly importing that there was no intention to give those rules and regulations any effect beyond the limits of the district. It was not intended to declare that the given custom or rule, prevailing in a given mining district, should be enforced in all districts throughout the State, and certainly it was not intended that the rule or custom should be enforced in other portions of the State, which did not constitute any portion of any mining district.

We regard it as beyond all question or doubt, that no custom, rule or regulation was ever established by miners, or was ever in force in any mining district, which extended beyond the limits of the district. It is well known, as a matter of history, and a matter often mentioned by the Courts of the State, that the mining rules and regulations, were such as the miners themselves, *at a meeting in the district*, adopted and established as rules, regulations and customs governing themselves, and

were never intended by the miners themselves, to be operative upon either lands or persons beyond the limits of the district.

These customs, rules and regulations when adopted, and while in force in any district, related solely to the locating and holding of mining claims. They provided for the notice of the location of claims, the posting and recording of the notices, the dimensions of claims, the marking of their boundaries, the amount of work to be performed annually, the forfeiture or abandonment of the claims, and when and how they could be relocated.

There never was in force, in any mining district, any regulation, custom or rule describing the manner of working mining claims. Mere *practice* prevailing in any locality, or generally in the State, does not amount to a regulation, or custom, or rule of miners, within the meaning of the Act of Congress, or of any statute of the State or decision of the courts. A practice of miners to permit water and debris from their claims to flow into the next and most convenient cañon or stream, is not a custom, and has not, and cannot have the force of a mining law. The practice, even in mining districts, has never been upheld when it resulted in an injury to others. This question has often been litigated in the courts of the State, and whenever injury was done to others, redress has been given.

Parties have, in many instances, been restrained from causing or permitting their mining debris to flow upon the mining land of others. We venture to say, that no case can be found in the courts of this State, in which injury has been shown to have

been produced by the working on a mining claim, in which the court refused redress. The denial of redress in such cases, would be in conflict with some of the most sacred principles of the law of property.

We will mention a few only, out of the many cases decided by the Supreme Court of this State.

Hill v. *Smith*, 27 Cal., 476.
Same v. *Same*, 32 Cal., 166.
Richardson v. *Kier*, 34 Cal., 63.
Courtwright v. *Bear River*, 30 Cal., 573.
Robinson v *Black Diamond*, 50 Cal., 461.

The doctrine of those cases is that a miner has not the right to dump his debris upon, or so that it will flow upon, the property of another, whether such property be used for mining or any other purpose. In several of those cases, the court applied the well known maxim—*Sic utere tuo ut alienum non laedas.*

A *practice* has prevailed among miners, of procuring timber, fuel, stones and all other materials which might be necessary or convenient for mining, from the most convenient places where they might be found, without regard to the fact that the land was the land of the United States. Will it now be claimed that such practice has become a custom of the miners, and now has such efficacy that the miners may still go upon lands, which were public lands when the mining claim was located, and take therefrom timber, fuel and lumber at their will. But even if such a practice could be regarded as a *custom*, no number of acts of Congress or statutes of a State could authorize such

practices to be performed upon the lands of others, by dignifying it as a custom of miners. Such a recognition or sanction of a custom would be destructive of the rights of property, while it is the purpose of laws to conserve such rights. Should the position of the defendant, in this regard, be sustained, and should other kinds of business claim similar or analogous rights, founded upon practice, which is attempted to be strengthened and dignified by calling it a custom, it would be difficult to say what right of property remained.

V.

A Way of Necessity.

It is insisted by the defendant that as the practice just mentioned prevailed when the acts of Congress were passed, the practice was presumptively known to Congress, and that, therefore, the authority to take up mining claims, and to acquire title to the mining land, carried with it necessarily the authority to continue to mine in that manner, to continue that practice ; and it is also contended by the defendant that as the manner in which its mining is conducted is the only way in which the land can be mined, the miners have a way of necessity, in the streams and rivers of the State for the flow and deposit of debris from their mines. It never before was claimed that the purchaser from the United States of one tract of land, acquired a way of necessity through an adjoining tract of land, simply for the reason that the adjoining land was owned by the United States at the time

of the sale of the first tract. The doctrine of the way of necessity, has never been applied except in the case of a private party, who, owning a tract of land, sells a portion thereof to a third party, and the portion sold is so situated that no access can be had to the public way, except through the land still retained by the grantor. We have never heard of a case in which this doctrine was applied either to the United States or to the State ; but, however this may be, it never was the rule that when one party acquires a title to land from another, that the one acquiring the title has a way of necessity through the lands of a *third* party.

The United States could not themselves have worked these mines in such a manner as to cause an injury to the lands of individuals, or destroy the navigation of the navigable waters. The United States could not have claimed a way of necessity along the navigable streams of the State ; and, clearly, the United States conld not have claimed a way of necessity over the lands of private parties. The United States, not possessing such a right, could not, by any possibility, confer it upon their grantees.

While conceding the full force of the maxim that whoever grants a thing, is supposed to tacitly grant that, without which the grant would be of no avail, it is of no force as an argument to prove that that which is supposed to be granted, is in truth subject to the power and control of the grantor. It may have already been granted to or vested in another person. Neither any right in

private lands, nor any permission to obstruct the navigable waters of the State, are among the things which are *supposed also to be granted* to the grantee of a mine; and this is so, for the very simple reason, that neither were subject to the control of Congress when it granted the mine. It must be remembered that the Legislature of the State, which has the exclusive power to define a public nuisance and provide for its punishment, has declared, in Civil Code, section 482, that the *express authority* of the statute is necessary to excuse or justify what otherwise would be a nuisance. It must be remembered also, that Congress possesses no power in respect to nuisances, save only in respect to those things which may interfere with the exercise of certain of the powers delegated to Congress, such as the regulation of commerce, etc. It will also be remembered that Congress has no power to destroy navigation, and Congress possesses no power to authorize its destruction. The power to destroy navigation, cannot be inferred from the power to regulate commerce. As we have already stated, Congress has not directly authorized the use of the streams for the purposes mentioned; and so far from having authorized it by implication, provision is made in one of the acts of Congress above referred to, that in the acquisition of a right of way for mining purposes, damages must be paid to those who are merely in possession of mining land.

VI.

Easements and Drainage for Working Mines.

The defendant cites Section 5, of the Act of Congress of 1866, to the effect that the State Legislature, in the absence of legislation of Congress, may provide rules for working mines, "involving easements, drainage and all other means necessary to their complete development," as supporting the proposition, that Congress intended that miners should have the right to the navigable waters of the State, as well as other streams uniting therewith, for the flow and deposit of debris from the mines. Doubtless Congress may so empower the State to legislate respecting the public lands of the United States, for those lands were held by the United States, by all the title and with all the right that private persons hold or possess in or to their lands; but Congress could not delegate to the State powers which Congress itself did not possess. The lands upon which Congress intended to impose such servitudes, or authorize them to be imposed, under legislation to be adopted by the State, are public lands, and the power is limited exclusively to such lands. The delegated power is to be exercised only in the absence of congressional legislation; and it does not purport to be a power greater in extent or in its application, than could be exercised by Congress. The servitudes to which lands might be subjected under laws passed by the State, by virtue of this delegated power, could not be other or greater than Congress might directly authorize, nor could the servitudes be im-

posed on other lands than such as Congress might have directly charged therewith. As Congress could not impose such servitudes upon lands of private persons, or the lands belonging to the State, it could not delegate it to the State. That section does not expressly or by implication authorize an invasion of private property, nor the impairment of any public right. Had the Act of Congress intended to empower the State to provide the manner for the working of mines, as claimed by the defendant,—in other words, to provide that the debris might be deposited in and along the channels of the streams whether navigable or not, it is inconceivable that the Act would not have been so drawn as to leave that matter beyond a doubt;—that Congress would not have directly granted this authority, instead of leaving to the State, as is contended by the defendant the Act intends to do, by the creation of easements over the streams of the State, for the flow and deposit, of debris from the mines. The Act would have declared in express terms, that the miners are authorized to dump the debris from their mines into the nearest river, cañon or stream. A matter of such vital interest to the miners, and to the people of the State, would not have been left to dim implication, but, had such been the intent of Congress, it would have been directly and clearly expressed.

But whatever be the scope of the power which Congress delegated to the State in respect to the creation of servitudes, for the benefit of the mines; and whatever may be the lands upon which it was

intended that the servitudes might be charged, under the provisions of the State laws, is not the legitimate inference to be deduced from the fact of the delegation of that power, only this—that Congress knew, as was the fact, that these servitudes did not already exist, and that the aid of laws, emanating either from the State or Congress, were essential to the creation of such servitudes?

Why provide for the payment for the right of way, if those who might need and use the way, already possessed the right?

VII.

Has the State Authorized the Acts Complained of in this Case.

All recognize and admit the importance and the value of the mines and of mining industry in this State, though we do not all agree with the defendant, in assigning to the mines the relative importance and value, as compared with the other industries such as agriculture, commerce and manufactures that the defendant does. It is nowhere stated that all other industries must yield place to mining, nor is it declared that agriculture and commerce are in any degree subordinate to the mines. Were any argument deducible from the relative value of the mines as compared with agriculture, it would be easy to show the greater value of agriculture; and also to show the important fact, that in the progress of work on the mines, they would in time, be exhausted, and hundreds of thousand acres of land destroyed, and the rivers

virtually obliterated. It cannot be claimed, by any possibility, that the State has adopted any policy which must necessarily lead to such results.

The recognition and sanction, by statute, of the customs, usages and regulations of miners in any district, does not sustain the defendant's position; for, as has before been stated, they will not include the *manner of working* the mines; but even if it were so, no custom, rule or rugulation would be permitted to have such force as to effect private rights, or injure, or destroy the navigation of the rivers, for those rights are not subject either to miners rules, regulations or customs, nor even to the power of the legislature, whether in sanctioning them or otherwise.

Those rules, regulations and customs did not nor could they, control or subject either of those rights to the demands, use or claims of miners; and whatever extent they purported to have, their sanction by legislation did not, nor could it, extend their scope, or give them greater or further effect than they had at their adoption, as against those rights

The State has no power to subject private lands, or the navigable waters of the State, to the flow of debris. The common law was adopted in this State anterior to any recognition of miners' rules or customs. One of the most valued maxims of that system of law, and one which has been applied perhaps more frequently than any other, in the controversies between miners and those who claim that they have been injured by them, is the well known maxim—*Sic utere tuo ut alienum non laedas.*

While it may be stated that the State has sanctioned and encouraged the acquisition of rights to water for mining and other purposes, it cannot therefrom be claimed, that the State has granted or sanctioned the acquisition of the right of way over private land without payment therefor, or authorized the construction of dams, or other works, for the diversion of water, in the navigable waters of the State to the injury of navigation, or the occupation of the beds of the rivers in such manner that injury to navigation must inevitably ensue. Whatever encouragement the State may have given to mining, and to the appropriation for mining purposes, of waters upon the public lands of the United States, it cannot be construed as conferring any right, power or authority upon miners, by implication which the State could not have directly granted. Should an act be passed by the State, purporting to grant to miners the right to dump their mining debris in the beds of the navigable rivers and upon the lands of private persons, no one would venture to uphold the legality of the act. The claim of the same right, resting upon implication, is equally destitute of support.

VIII.

Eminent Domain.

It is claimed on the part of the defendant that the provisions of the Code of Civil Procedure (section 1238, sub. 5) to the effect that eminent domain may be exercised in behalf of roads, ditches, tunnels and dumping places for the work-

ing of mines, tends to show that the miners, for the purpose of mining, have the right of way over the lands of private persons, and along the streams within the State, for the purpose of a way for the dumping and flow of the debris.

Con. Channel Co. vs. *C. C. R. R. Co.*, 51 Cal., 269,

decided that Sub. 5 of that section was unconstitutional; and if that decision be upheld, notwithstanding the adverse argument and criticism of the defendant, then the adoption of that subdivision of the section has no bearing on the question under consideration. We admit that a power similar to that of eminent domain, but really not eminent domain, may, by the Legislature of the State, under the power conferred thereon by the act of Congress, be authorized to be exercised by the courts of the State, in securing to miners the right of way over the lands of the United States, and over the lands which were formerly owned by the United States, but were sold subject to the right of way, so to be secured by the exercise of that power. There would seem to be no doubt that the State may, if it chooses, provide for the exercise of that power, by virtue of the authorization of Congress; but the exercise of such right comes from the power reserved by Congress to dispose of the public lands, and Congress, having that power, may authorize the State to exercise it, which, for the want of a better name, may be denominated eminent domain power; but it is simply the right which Congress itself might have exercised over its own lands for the benefit of any interest whatsoever.

But assuming that the section of the Code above referred to, be valid, then we think that the provision for condemnation and payment for the right of way, tends to show that the miners did not have the right of way for those purposes, prior to the act of Congress. If they already possessed it, why require them to pay for it in condemnation proceedings? The grant of authority to condemn forcibly, if not conclusively, shows that the right does not exist without condemnation. It needs no argument to show that the eminent domain power is not operative on the navigable waters, or the beds of the navigable rivers.

There is nothing in the eminent domain law, nor in the act of Congress, authorizing its exercise by the State, which tends to the conclusion that its purpose was to destroy or impair the right of navigation by means of or under the administration of that law. If the exercise of this power will necessarily result in the destruction of navigation or injury to private property, not taken under that law, as is claimed by the defendant, then it inevitably follows that the power could not be exercised by the miners to secure dumping places for the debris. It is unnecessary to discuss the question, whether the use for a way for the flow of debris and for dumping grounds is a public use; for if it be, it can be acquired only by purchase, or under the power of eminent domain. Such use, as to private lands, cannot be acquired except by purchase, or under the operation of that power; and as to navigable waters, they are beyond the reach of purchase or of the eminent domain power.

We do not, as the defendant assumes, claim that mining is a crime or a nuisance, or an illegal business; but say that like any other business, such for instance as butchering, it must be so conducted as not to injure the rights or property of others. Of course it is lawful when conducted in a lawful manner. It did not require the aid of the State, by statutes, or by any sort of recognition or sanction of the rules or regulations and customs of miners, to render the business lawful or in any respect legitimate; but like any other business, it must be so conducted, as not to injure others, or impair or destroy public rights. Legislative recognition of the right to mine on public lands, confers no authority to mine in such a manner as to work an injury to others. In this respect it differs from no other business.

It is urged that the State cannot say that the eminent domain provision of the Code above re- to is unconstitutional, because, it is claimed, no one, except those whose property is taken for the dumping ground for debris, can complain of the taking of their lands for that use. This position cannot be correct, for, if the definition of a nuisance as given by the Code, be valid, injury to property of a considerable number of persons must be a public nuisance; and the State necessarily has the power to complain of, abate and prevent a public nuisance.

IX.

Defendant's Claim of a Reasonable Use of the Stream.

It might be conceded that each mine is entitled to a reasonable use of a stream for mining purposes, but the question will recur: *What is a reasonable use of a stream?* No uniform rule in this respect can be laid down. The reasonableness of the use will depend on many circumstances. Each case must depend upon its own peculiar conditions. The flow and current of the stream may be such, that all the debris cast into it at a certain time will necessarily be transported into the navigable waters, and over large bodies of adjacent land. The bed of the stream may be so filled up by the excessive deposit of debris, that it is evenly graded; and it may at a given time be so filled that any considerable amount will necessarily do material injury. The amount of debris may be so large, and the condition of the stream may be such, that injury now is unavoidable, though injury may not have resulted, at an early date in mining, from a much larger contribution to the stream. It is probable that all the mines on the American River did not send into the lower section of the American River, in the earlier days of mining, as much debris as the defendant now contributes. No one can rightfully complain of smoke from the ordinary chimneys of residents in a city. All must submit to that slight inconvenience for the common good, but if a furnace stack be erected in the midst of the residences in a city, from which issues the smoke produced by the burning of a hundred tons

of coal daily, no one, we think, would hesitate upon the question of a nuisance.

It is impossible for the defendant to deposit in the river 600,000 cubic yards of debris annually without causing a public nuisance. Such use cannot now, in the present condition of the streams, be reasonable—injury would necessarily result. It is no answer to our complaints, that the defendant is causing a nuisance, to say that there is no practical mode, other than that adopted by the defendant, to mine its mining ground. The public has rights which have not been surrendered to the defendant, or others similarly situated; and those rights are certainly not subordinate to the convenience of any person, nor dependent upon the question whether he can successfully prosecute the business in which he is engaged, in a particular manner.

It is said in Wood on Nuisances, § 485.

"There can be no excuse for an actual nuisance. The lawfulness of a trade, its usefulness, its actual necessity even, affords no excuse, and is in no measure a defense. The fact that the best appliances and methods known to science have been adopted, or that the highest degree of care and skill has been exercised in carrying it on, is no defense; if actual injury ensues, the works are a nuisance, and must yield to the superior rights of others."

The same author says, § 488:

"The law does not balance conveniences, nor recognize the relative difference in damage between the injury to the rights of others on the one hand, and the damage and loss that will be entailed upon

the person, who, by the use of his property in a particular manner, violates those rights, by having his works declared a nuisance, and being compelled to remove them, on the other. The fact that the injury is slight is no excuse or defense, if a right is clearly violated, the works producing them are a nuisance and must yield to the superior right. It makes no difference that the works are really in the interests of society, and necessary for the preservation of the wealth of a community; if they are of that noxious character, or produce those noxious results that bring them within the idea of a nuisance, the person maintaining them is liable for all damage resulting to individuals specially injured thereby, and to indictment as for a public nuisance, where the location of the works and their affects are such as to injure the public." See also notes to above sections, also secs. 492 and 19, and notes.

X.

Customs of Miners.

Defendants claim of right to injure the lands of private parties, and to destroy the navigation of the river by reason of the custom of miners, finds no support in the elements of a custom.

The requisites of a lawful custom are considered in the briefs of my associates Messrs. Stabler & Bayne, and of George Cadwalader, and they need not be repeated here. It will be sufficient to say that the customs of miners which are recognized by the statute of California and by the decisions

of the courts, are only such customs as are not in conflict with the constitution or the laws of the State. This is so expressly provided by the earliest statute upon that subject, in this state — see Stats. 1851, p. 149—and that essential qualification has never been modified either by the statutes or the decisions of this State. That is the rule, as laid down in the Civil Code, § 748. The Act of Congress of 1866, provides that the miners of *each mining district* may make regulations, "not in conflict with the laws of the United States, or the State or Territory in which the district is situated," etc., and these provisions are also contained in the Rev. Stats. of the U. S., § 2319, 2324.

It will be remembered that every custom of miners, has its origin in a rule or regulation adopted by the miners of the district. There is no other mode in which it can be established, and there never was.

There never was a custom in a mining district in California which regulated the manner of working mines; none such was proven to have prevailed in the Gold Run district, and none was proven to have existed in any other district, or generally within the mining region of the State. It will be remembered also that the customs of miners whether regarded as laws or regulations, were confined to the district within which they were adopted. They were framed at meetings of mines, called for and within the district; they never were adopted as governing, nor intended to govern, any mining claim not in the district with-

in which they were adopted ; they never possessed any extra territorial force ; they never were regarded as operative upon agricultural lands, and certainly they were not intended to have any operation upon farming lands situated a hundred miles from the district within and for which they were advised and adopted. The custom relied upon here would violate the maxim, *Sic utere tuo ut alienum non laedas*, which is one of the maxims of the common law. The customs recognized by the Acts of Congress were only such customs as were not in conflict with the constitution and laws of the United States

See *Jennison* vs. *Kirk*, 98 U. S., 456.

The State could not by any attempted validation or recognition of customs, authorize or give sanction to them, if they worked an injury to navigation, or impaired the rights of property of private persons.

The *practice* of dumping the debris from the mines, cannot be dignified or made effectual by denominating it a custom. It was a mere practice. Such practice has no higher sanction, nor any greater force than had the practice of miners of obtaining their fuel, timber and other materials for mining purposes, from the most convenient places; and such custom has never been held to justify an invasion of private property.

But more forcible than any argument we can here present, is the repeated and uniform decisions of this court, restraining this practice of dumping at will upon the lands of others, and even upon

the mining claims of others within the same district.

Esmond vs. *Chew*, 15 Cal., 13,

involved this alleged right to dump debris upon an adjacent mine, and the right was denied by the Court.

Logan vs. *Driscoll*, 19 Cal., 623,

involved a similar claim as between miners, and with a similar result.

See also—

Hill vs. *Smith*, 27 Cal., 476.

The action was brought by a farmer against the owner of a ditch which deposited mining debris on his land, in—

Courtwright vs. *Bear River*, 30 Cal., 573.

The action was by a farmer, against a miner for injury caused by debris, in—

Richardson vs. *Kier*, 34 Cal., 63.

Farming lands again sought and received protection from the debris from mines in—

Robinson vs. *Black Diamond*, 57 Cal., 412.

The only *material* difference between the questions involved in that case and this consisted in the fact that in that case the debris came from coal mines, while in this it comes from gold mines.

Many additional cases might be cited from the decisions of this Court—all repudiating the claim of right here set up by the defendant.

XI.

Prescription.

The defense of prescription is without foundation, and possesses no merits of any kind. "It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the State."—Cooley on Torts., p. 613. Our Civil Code, § 3490, is but the embodiment of the rule of law which has found expression in innumerable cases, both in the United States and England. No reported case nor law writer questions the correctness of the rule.

It cannot run as against the public or a public right. The well-known maxim, "*Nulum tempus occurrit regi*," is applicable in every respect, as against the claim set up by the defendants here. If this matter of injury to the lands of a considerable number of private persons be a public nuisance, time will not run against any action or prosecution which might be instituted to abate or restrain it. If the matter complained of in respect to the injury of large bodies of land be a public nuisance, then an action on behalf of the State is not barred, even though it be held—contrary to what we understand to be the law—that the owners of the land could not themselves maintain actions for special damages to their several tracts of land. Whatever is a public nuisance by statutory definition, is not within the protection of prescription or the statute of limitation.

In case the acts of a party cause waters to overflow many tracts of land, and to stand thereon,

and to become stagnant and foul, however it might be as to the owners of the land being barred by the lapse of time, clearly the State is not barred, when prosecuting an action for a nuisance consisting of injuries to the public health.

But the defendant has not in its pleadings, nor in any other manner, defined the bounds of the lands in respect to which it claims the prescription relied upon in the argument. A party could, if facts warranted it, claim a right of way along a stream running through a tract of land of a particular person, but it is incumbent upon the party claiming the right of way by prescription to describe both the tract of land and the way. The same exactness is required in pleading prescription, as in pleading adverse possession of land in defense of an action of ejectment. In order to avail himself of prescription, in respect to *lands of private parties*, prescription being in that respect no more than a claim arising under tne statute of limitations, it is incumbent upon such party to describe the lands which were inclosed, improved and cultivated by him.

It is needless to discuss the question whether the defendant and the other miners, or the defendant alone, have or has acquired, by the operation of the principles of prescription, a right of way along the American River and its tributaries, in the mountains, for the complaint here is not that they use those streams, but rather that the defendant and other miners so dump the debris from their mines, that it is transported into the navigable waters and over the lands of private persons. Even

if the defendant has acquired a right of way by prescription, to the streams above the navigable waters—and we deny that he has a shadow of such right—it cannot, in the nature of things, extend to the navigable waters, and there is nothing in the case tending to show a prescription right to the lands which have been, or are being invaded by the mining debris. Any right that the defendant has acquired in those lands, must have enured under the operation of the Statute of Limitations. It is not any right of way over those lands, but it is the right or title, if any, that comes from adverse possession, under the operation of the Statute of Limitations. It might be asked is the dumping of debris upon a tract of land, a cultivation of the land?

If any such prescription exists, it must also operate in favor of all of the miners on the water-shed of the stream, down which is carried the debris, which flows upon the lands in respect to which the prescription is claimed. No one has ever yet heard, under the system of laws prevailing in the United States, of such a principle or rule of law, as the one contended for here by the defendant—the right by prescription, which pertains to everybody ; that is to say, to each person who might from time to time, and year to year, enter up a tract of mining land situated upon a stream, down which the debris from the mines had been accustomed to be carried. Had the defendant here defined and described both the land and the way, the difficulties it has to encounter would not have been overcome The inherent difficulties of

the case could not have been remedied by a matter of pleading.

In respect to the lands, our complaint is, not that the defendant has covered certain lands with debris from one to fifteen feet in depth, but it is that if the defendant prosecutes his work, the debris will flow upon and cover *other lands*, other lands than the several tracts of land already injured. The debris has already covered 10,000 acres of land, and, if not restrained, it will cover 90,000 in addition. The injury to the 10,000 acres is described for the purpose of showing what will be the condition of the additional 90,000 acres if the operations of the defendant are not restrained. We pray that the defendant be restrained from overwhelming 90,000 acres of land, in the manner and by the process, in which he has overwhelmed 10,000 acres.

There is no such thing as a prescriptive right of way, over lands as one may please to exercise it, anywhere and everywhere, over 100,000 acres of land, or over 1,000 farms, aggregate 100,000 acres. The interrupted and adverse exercise of the right of way over a strip of land through a farm, though exercised during the statutory period of limitation, does not tend to show a right by prescription over lands not included within the given strip. A person who, by the maintenance of a dam in a stream, has flooded a portion of the lands of a neighbor, cannot be heard to say, in defense of the action, brought by his neighbor, to enjoin acts which would result in flooding more land, that having acquired by prescription the right to maintain the dam and

flood the lands, so far as they have been flooded, his right by prescription justifies and authorizes him to raise the dam, and perform other acts which would result in flooding other lands to the injury of his neighbor. The defendant cannot claim on any principle that has found expression in any adjudged case, that because he is protected by the statute against an action, by a land owner, for flooding with debris 100 acres of his farm next to the river—because he has acquired by prescription the right so to do—therefore, he has the right by prescription to overwhelm the next 100 acres of the same farm, lying in the rear of the first 100, and which is as yet undefiled by debris. If the defendant has the prescription right to add at will, to the deposits of debris on the 10,000 acres, to add another four feet to the depth of the debris thereon, it cannot, for that reason, be claimed on any recognized principle, that because of its possession and exercise of that right, it is entitled to deposit its mining debris upon 90,000 acres which up to this time has escaped the flood.

XII.

Equitable Considerations.

In regard to the equitable considerations, so earnestly expressed by the defendant, to induce the Court to permit it to continue its mining operations, in the same manner in the future as in the past, we would only say, that it is as obvious to the defendant, as to any one who is conversant with the system of mining, that those considera-

tions are urged in the presence of the unmistakable and obvious facts, that every thousand yards of material extracted from the mine lessens the value of the mine, and also lessens the value of some portion of the 100,000 acres upon which the debris will flow; and that these facts will be constant, until the mine has become valueless by exhaustion, and the lands have also become valueless by the overwhelming mass of mining debris.

XIII.

The Attorney-General Had Authority to Bring this Action

This point should have preceded those already discussed, but we preferred to follow in the main, the order adopted by the defendant.

The State may institute a suit in equity to prevent or abate a nuisance.

It is said in—

2 Sto., Eq. Juris., § 923-4.

"In cases of public nuisances, properly so called, an indictment lies to abate them, and punish the offenders. But an *information* also lies in Equity to redress the grievance, by way of injunction." And the author proceeds to say, that informations have been maintained for stopping a highway; also, that in cases of nuisances to harbors — when the soil does not belong to the Crown, but the act complained of is a common nuisance, an *information* in Equity lies. The ground of the jurisdiction of the Courts of

Equity, it is further said, is their ability to give a *more complete and perfect remedy* than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations; that they can restrain and prevent such as are threatened, or are in progress; that the remedy is complete through all future time; that the remedy is prompt and immediate, *and before the injury has become irreparable.* See also:

People vs. *Davidson*, 30 Cal., 379,

The Court of Appeals, in—

People vs. *Vanderbilt*, 26 N. Y., 295-8,

sustained an information for an injunction brought by the Attorney-General, to restrain the erection of a crib for a pier in the harbor of New York.

It is held in—

Davis v. *Mayor of N. Y.*, 14 N. Y., 526,

that in all cases of public nuisance, where a preventive remedy is called for by the circumstances, the State may maintain the action by information brought by the Attorney-General.

The jurisdiction of the Court of Chancery in England, of suits in equity in cases of nuisance, is undoubted.

2 Eden on Injunction, 259.
Att'y-Genl. vs. *Richards*, 2 Anst., 603.
Att'y-Genl. vs. *Parmeter*, 10 Price, 378.
Att'y-Genl. vs. *Burridge*, 10 id., 350.

Att'y-Genl. vs. *Johnson*, 2 Wils. Ch., 87.
Att'y-Genl. vs. *Forbes*, 2 Mylue, &c., 129.
Att'y-Genl. vs. *Cleaver*, 18 Ves., 211, *and notes.*

A State, without any special authorization, may maintain an action for breach of contract made with it, or for the redress of its wrongs. It possesses this right by virtue of its sovereignty, and it requires no special authorization, either by the Constitution or the Statute.

State of Pa. vs. *Wheeling Bridge*, 13 How., 560.
Delafield vs. *State of Ill.*, 2 Hill, 162.
State of Ind. vs. *Worram*, 6 Hill, 36.

The position we maintain is that the Attorney-General is a constitutional officer, and many powers and duties necessarily pertain to the office which may not be enumerated in the Statutes. That is the doctrine of—

Love vs. *Behr*, 47 Cal., 364–7.

It is held in—

People vs. *Stratton*, 25 Cal., 247,

that where the matter involved in the suit concerns the rights and interests of the State, the Attorney-General exercises control "by analogy to the powers exercised by officers of like character in England and in most, if not all, of the States of the American Union."

Actions have been brought and maintained by

the Attorney-General in the courts of this State, for which no express authority was found in the Statutes.

It may be said that a conclusive argument cannot be drawn from the precedents in this State; but if not conclusive, it is very convincing. Very many of the cases to which reference is hereafter made would justly be regarded as absurd, if it be true, as a legal proposition, that the Attorney-General had no authority to institute the actions in those cases.

We cite a few of those cases:

People vs. *Davidson*, 30 Cal., 379,

was brought to restrain the maintenace of a wharf, it being alleged to be a nuisance.

People vs. *Jackson*, 24 Cal., 630.
People vs. *Morrill*, 26 Cal., 336.
People vs. *Carrick*, 51 Cal., 325.

All of the above were actions to annul patents for lands, issued by the State, and in the last two of them, the right of the State to have the patents annulled is sustained.

People vs. *Shearer*, 30 Cal., 645,

was an action to compel the assessors to assess the interests of certain persons in lands.

People vs. *Supervisors of Kern*, 47 Cal., 81,

was prohibition to restrain the levy of a tax.

People vs. *Board of Supervisors*, 44 Cal, 613,

was certiorari to review the action of the Board in striking off certain assessments.

People vs. *Asbury*, 44 Cal., 616,

was mandamus to compel the entry on the tax list of certain assessments.

People vs. *State Board of Education*, 49 Cal., 684,

was certiorari to the Board to annul its order relating to school books.

People vs. *Board of Education*, 54 Cal., 375,

was certiorari to the Board for a similar purpose.

People vs. *Board of Education*, 55 Cal., 331,

was mandamus, involving a similar question.

People vs. *Supervisors of San Luis Obispo*, 50 Cal., 561.

was mandamus to compel Board to issue bonds.

People vs. *Broadway Wharf*, 31 Cal., 33,

was brought to recover a wharf.

People vs. *Recl. Dist.* No. 108, 53 Cal., 346,

was brought for the purpose of abrogating that District.

People vs. *Parks*, 58 Cal., 624,

to test the constitutionality of the "Drainage Act."

Sacramento vs. *C. P. R. R. Co.*, 61 Cal, 251,

is cited as very cogent authority.

The question whether in any case the Attorney-General has power to institute an action, is not to

be solved by an examination of the Statutes, to ascertain whether authority is there expressly given; but the true rule is, that whenever it be found that a cause of action has accrued to the State, the Attorney-General has authority to institute an action unless authority be given, expressly, or by necessary implication, to some other office.

Respectfully submitted,

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